APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

Dec. 14, 1981

Appeal from the United States District Court
for the Middle District of Alabama

Before TUTTLE, HENDERSON and HATCHETT, Circuit Judges.

TUTTLE, Circuit Judge:

By this appeal we are required to construe and apply the provisions of the Landrum-Griffin Act, particularly 29 U.S.C. § 501(b) when persons alleging themselves to be members of a local union seek permission of a United States district court to file an action against former officers of the local alleging misappropriation of union funds, in which action the prospective plaintiffs seek to make a recovery for the benefit of the union.

This section provides:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have

violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b).

The petitioners, here the appellants, filed their petition with the district court seeking permission to file their suit as members of Local 7326 of the International Union, United Steel Workers, alleging that several former officers had, during a strike in which the petitioners had participated, embezzled and misappropriated money furnished to the Union by the International for strike benefits. The petition alleged that the petitioners were, at the time, members of Local 7326. They alleged sufficient facts which would have supported a complaint alleging misapplication of funds as outlined in § 501(b). They also alleged that they had "made demand by letter to United Steel Workers of America [their international union] to take the necessary action to prevent any further union funds from being misused by defendants for the above-

mentioned purposes, and to take immediate steps, by filing court action, to recover from the individual defendants the funds the defendants have wrongfully expended." They alleged the officers of the International had failed under a reasonable time to take such action. Based on such application, sworn to by the parties and presented to the court ex parte as is permitted under the statute, the trial court entered its order granting leave to file the petitioners' complaint.

Thereafter, after granting leave to the named respondents to delay the filing of their response, the trial court set down for a hearing a motion by United Steel Workers of America for permission to intervene for the purpose of moving the court to revoke its order permitting the filing of petitioners' complaint. This motion to intervene was supported by a long affidavit by the associate general counsel of the United Steel Workers of America, who outlined the usual procedures for the handling of the affairs of locals which are in similar circumstances to Local No. 7326. Neither the petition to intervene nor the Frankel affidavit categorically stated that the petitioners were no longer "members" of the union. This affidavit was extensively answered by counsel for petitioners prior to the hearing conducted by the trial court. The court did not enter an order allowing the intervention, but considered the pleading and affidavit as though it had done so.

The historical facts necessary for us to consider the correctness of the trial court's order revoking its original grant of permission to the petitioners to file their complaint are not in dispute. The membership of Local 7326 consisted entirely of production and maintenance employees employed by American Buildings Company in Eufaula, Alabama. As of January 1, 1978 there were approximately 300 workers employed in the plant. There was a similar number of members of the Local in December of 1976, at the time of the expiration of the most

recent collective bargaining agreement between the Local and the Company. Following the expiration of that agreement, USW commenced a strike against the Company over the terms of a proposed new agreement. The strike was authorized by a vote of the membership of Local 7326. It proved to be a long, bitterly contested struggle which was lost in the end by the Union. In support of the strike the AFL-CIO declared a boycott of the Company's products. The Local lost the right to represent the Company's employees following its defeat in a National Labor Relations Board decertification election conducted on May 18, 1978. This election became final by the Board's certification of the results of the election on July 14, 1978.

Local 7326 did not serve as collective bargaining representative for employees of any other employer than American Building Company. Thereupon, by letter dated July 14, 1978, the director of the district of USW in which Local 7326 was located requested that an administrator be appointed for Local 7326. This was apparently done under the provisions of Article IX of International's constitution which provides "in the event the International president shall have reason to believe any local union is failing to comply with any provision of the constitution, or that action may be required for one of the purposes specified in the following paragraph, the International president may, unilaterally or at the request of officers or members of the local union, institute proceedings . . . which may after appropriate hearings result in suspending or revoking the charter of any such local union." Included as one of the purposes mentioned above for which such action can be taken is "otherwise carrying out the legitimate objects of the International union or such local." Presumably, in the opinion of the district director, such administrator was to be appointed because, in the language of the general counsel's affidavit: "This is the usual *first step* in a procedure followed in cases

where locals have ceased to represent any employees." [Emphasis added.]

Following this appointment, the parties apparently agree that Local 7326 has been dormant; no dues have been paid and no meetings have been held. There apparently have been no collective bargaining or other union activities. Petitioners are still employees of American Buildings Company.

The International contends that under these circumstances, the petitioners were no longer "members" of the Union. Petitioners, on the other hand, contend that until the charter has been revoked, the administrator has completed his audit and the funds have been properly disbursed, they are still members of the Local and of the International. They further contend that even if they were not technically "members" at the time the suit was filed, they nevertheless should be treated as "members-in-substance" and be permitted to file the complaint as members.

Although the petitioners, in their opposition to the trial court's reconsideration of its order granting permission to file the complaint, included a paragraph quoting from the Landrum-Griffin Act section under "definitions" dealing with "members," the trial court did not mention this definition in its disposition of the case. It held in effect, that the decertification brought about the dormancy of the Local which resulted in the loss of membership by all of its previous members, including the petitioners. It held that since they were not technically members they were not qualified under the statute to file such a complaint. The court bolstered its determination of this issue by equating the status of a "member" under § 502 with that of a former stockholder in a derivate suit, citing in support of this theory, *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). This Court has held that a former stockholder is not qualified to bring an action on behalf of his corporation under Fed.

R.Civ.Proc. 23.1. *Schilling v. Belcher*, 582 F.2d 995 (5th Cir. 1978), where we stated: "Only a shareholder, by virtue of his 'proprietary interest in the corporate enterprise,'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321, 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may "'step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own.'"

The difficulty with this reasoning is that this statute makes a "member" of the union a statutory representative "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). It is thus not necessary that the petitioners in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members, the law says they have the standing to conduct litigation.

Moreover, it is appropriate when considering the meaning of the words in § 501(b) to look at the definition section of Chapter 11, of which this section is a part. This definition section is found at 29 U.S.C. § 402, in which it is stated:

> For the purposes of this chapter . . . ¶ O "member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the Constitution and bylaws of such organization.

The proof before the court at the time of the hearing was that these petitioners were still employees, they had not voluntarily withdrawn from membership and they had not been expelled or suspended from membership. It is difficult to understand, therefore, how the International can contend that they were not "members" of the

Local at the time the suit was filed. When it was creating a new right in "members" of a union, it was surely within the power of Congress to say "for the purposes of this Chapter we now say who is a member." This is the precise language of the statute.

The effect to be given to this definition has been ably described by the Court of Appeals for the Seventh Circuit:

> As is apparent from the choice of terms, Congress did not limit the protections of the Landrum-Griffin Act to those whom the union recognizes as members. Rather, one who has fulfilled the membership requirements, that is, one who is a member in substance, is protected. *Hughes v. Local 11, International Association of Bridge, Structural & Ornamental Ironworkers*, 287 F.2d 810, 814 (3d Cir.), *cert. denied*, 368 U.S. 829, 82 S.Ct. 51, 7 L.Ed.2d 32 (1961). There is little dispute that the laid-off employees satisfied the union's membership requirements. There is also little dispute that the laid-off employees were not members in good standing because they had not paid dues since their layoff. But under section 402(c), one who has met the membership requirements remains a member within the meaning of the Act until one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after "appropriate proceedings" held pursuant to lawful constitutional or bylaw provisions. *See Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213, 217 & n.6 (7th Cir. 1974). Neither of these events occurred here; the union simply classified the laid-off employees as being no longer in good standing. Since laid-off employees did not voluntarily withdraw and the union did not expel or suspend them, they are "members" and therefore protected by the equal rights guarantee of section 411,

subject to the union's reasonable rules and regulations.

Alvey v. General Elec. Co., 622 F.2d 1279, 1284 (7th Cir. 1980).

We recognize that a particular union may have internal rules of membership, but these cannot limit the definition of "member" as contained in the statute that creates a cause of action by a "member." *See Hughes v. Local 11, etc.*, 287 F.2d 810, 817 (3d Cir. 1960). In any event, there is nothing in the constitution[1] of the International that is inconsistent with the definition of "member" in the statute. The assistant general counsel's affidavit, as quoted above, simply states that the administrator, William Caldwell, "took over the affairs of the local upon his appointment. This is the usual first step in the procedure followed in cases where locals have ceased to represent any employees." Article IX provides that when an administrator is appointed for a local union, he

> shall have the right to demand and receive in the name of the International union, and the local union officers shall have the obligation to turn over, the charter and all books, records, monies, assets and property of the local union, *to be held in trust for the local union* and to be used and expended only in the proper conduct of *its* affairs. The administrator shall have the right to replace officers, grievants or other committee members or stewards removed by the International executive board or the administrator, by appointing temporary officers, grievants or other committee members or stewards. [Emphasis added.]

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[1] Parts of the constitution were quoted in affidavits of the International. Petitioner moved this Court to supplement the record by receiving the entire constitution in evidence. This was not objected to by the International. We, therefore, grant that motion.

Thus, it is plain that the appointment of an administrator does not in and of itself terminate the Local. Since the Local cannot exist without members, it seems clear even under the constitution, that the persons who are in good standing upon the date of the appointment of the administrator continue to be members unless they are subsequently suspended or expelled or elect to "voluntarily withdraw."

The record is silent as to what activities the administrator engaged in during the 18 months between the time he took charge and the filing of the petition now before the Court. It is clear, however, that the charter had not been surrendered or canceled by the International, no proceedings had been started against any members looking towards their expulsion and none of them had voluntarily withdrawn from membership. The record discloses that there was some $2,000 in the treasury of the Local at the time the administrator was appointed and the record is not at all clear that pending the final winding up of the Local's affairs these funds belonged to the International as distinguished from the Local for whom, under the language quoted above, they were "to be held in trust . . . and to be used and expended only in the proper conduct of its affairs."

The International further claims, however, that an ingredient in the trial court's decision granting such a petition is that there must be a finding that there had been a showing of "good cause." The International contends that the way it handled the matter instead of filing suit as outlined in the statute itself would have been more beneficial to the Union than to have acted as requested by the members. This, of course, cannot establish a want of good cause, because the language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring such suit. The trial court could not

second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. The trial court found that this precondition had been satisfied.

In its motion to the trial court to vacate its original order, the International stated that one of its purposes was to "enable the Court to consider the matter of plaintiff's compliance with the jurisdictional prerequisites to this action and the question of 'good cause' under 29 U.S.C. § 501(b) on the basis of a full record." Upon the trial court's reconsideration, responding to such motion, the court did not withdraw or modify its earlier determination that the preconditions other than that of membership had been satisfied. It held only that the membership requirement had not been satisfied and made this the basis of its withdrawal of its earlier order.

Whatever may ordinarily be the requirement of the section as to the establishment of good cause, we are satisfied that it was adequately established in this case, once we have determined that these petitioners were members as contemplated by the Act. *See, e.g., Horner v. Ferron*, 362 F.2d 224 (9th Cir. 1966) and *Dinko v. Wall*, 531 F.2d 68 (2d Cir. 1976), which comments on *Horner v. Ferron* as the "most extensive treatment of good cause" to be found. Rather than accepting the standard of *Dinko* that the good cause requirement in § 501(b) means "that plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence," we associate ourselves with the standard of the Court of Appeals for the Ninth Circuit as announced in *Horner, supra*. There, the Court said:

> Thus if the defendant can establish by undisputed affidavit, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or

that the action cannot succeed because of the application of the principles *res judicata* or collateral estoppel, or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application.

However, we think it inappropriate to consider, at such a hearing, defenses which require the resolution of complex questions of law going to the substance of the case. Defenses of this kind should be appraised only on motion for summary judgment or after a trial. Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of summary judgment procedure, are *a fortiori*, beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken. [Footnotes omitted.]

362 F.2d at 229.

Under such a standard, we conclude that good cause was shown in this case.

Upon the filing of the motion by the law firm of Cooper, Mitch and Crawford, for a delay within which to plead to the original complaint, the petitioners filed their motion "to disqualify the law firm of Cooper, Mitch and Crawford and any and all individual attorneys therein from providing legal service of any nature to the named defendants herein." The motion also sought an order "enjoining the United Steel Workers of America from engaging legal counsel or retaining legal counsel on behalf of the individual defendants herein." The grounds for the alleged disqualification were the assertions by the

petitioners that the said law firm had represented the Local in proceedings before the National Labor Relations Board prior to the decertification order and that the International should be enjoined from otherwise providing counsel because of a conflict of interest, pursuant to the Labor Management Reporting and Disclosure Act of 1959. The trial court did not pass on these motions. They remain to be dealt with upon remand.

The trial court's order of June 30, 1980, 494 F.Supp. 732, withdrawing the leave to file a complaint previously granted on May 1, 1980 is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON, and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

March 19, 1982

On Petition for Rehearing, 663 F.2d 1048, and Suggestion for Rehearing En Banc; Truman M. Hobbs, Judge.

Before TUTTLE, HENDERSON, and HATCHETT, Circuit Judges.

PER CURIAM:

The statement contained in the opinions that "petitioners are still employees of American Building Company," appears not to be supported by the evidence in the record. It is therefore stricken from the opinion.

The Petition for Rehearing is DENIED.

No member of this panel or Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 25), the suggestion for Rehearing En Banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
M. D. ALABAMA, N. D.

Civ. A. No. 80-180-N

ELBERT ERKINS, and SAMUEL DENSON, and PERRY CULPEPPER,
Plaintiffs,

v.

BILLY BRYAN, and ARTHUR COMER, and GEORGE BULLARD, and CHARLIE GREENE,
Defendants.

June 30, 1980

ORDER

HOBBS, District Judge.

This case illustrates again the pitfalls of *ex parte* orders; even in those circumstances where Congress by statute has expressly authorized such orders.

The plaintiffs in accordance with Section 501(b) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 501(b)) petitioned this Court for leave to file a complaint against certain officers of Local Union No. 7326 of United Steelworkers of America who allegedly took union funds and expended them for unauthorized and improper purposes including purchases for the personal benefit of said officers. Plaintiffs by this complaint seek to compel the officers of the local union to account for all expenditures made by them out of union funds and to require the defendant union officials

to reimburse Local 7326 and USW for all improper expenditures of union funds made or authorized by them.[1]

Section 501(b) provides as follows:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United

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[1] USW was granted the right to be heard on its plea for reconsideration of the *ex parte* order of this Court in granting plaintiffs the right to file their complaint for the benefit of USW against officers of Local Union No. 7326. Plaintiffs challenge the right of USW to "intervene" in this proceeding by way of urging such reconsideration, because Rule 24(c) requires that a motion "to intervene be accompanied by a pleading setting forth the claim or defense for which the intervention is sought." Plaintiffs correctly argue that USW has no intention of filing a pleading setting forth a claim or defense. But USW has filed a Motion to Vacate Leave to File a Complaint with accompanying memorandum and affidavits. The Federal Rules of Civil Procedure were not written with the almost unique situation in mind in which a plaintiff must obtain permission of court in order to file a complaint. In the instant proceeding, USW does not desire to join issue on the complaint. It simply desires to question the jurisdiction of this Court under § 501(b) of Title 29 to allow this suit to be brought by these plaintiffs for the benefit of USW.

Although the Court is of the opinion that USW has a right to ask for such reconsideration, if the plaintiffs lack standing to bring this suit, the Court could and should on its own motion, re-examine a ruling where the Court has the independent obligation under § 501(b) to determine prior to the commencement of the suit whether the conditions precedent to bringing the suit have been met. This Court, therefore, does consider the oral arguments advanced by the plaintiffs and counsel for USW as well as the memoranda and affidavits filed by them in determining whether its original order was proper.

> States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

The purpose of allowing suit by union members is "to further union democracy and thereby prevent misuse of power of union leaders." *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). The suit is for the benefit of the union, not its individual members or the named plaintiffs. As is clear from its reading, § 501(b) imposed certain conditions precedent to suit.

First, a demand must be made on the union to bring an action to recover the allegedly misappropriated funds. Plaintiffs made such a demand.

Second, the labor organization must refuse or fail to sue to recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so. The union in this case has failed to sue although it was provided with a letter in mid-December, 1979, requesting an accounting and alleging misappropriation of union funds by officers of Local Union No. 7326. A representative of USW responded to this letter by requesting the basis for the charges against officials of the Local union. In February 1980, plaintiffs sent an affidavit to USW which contained information suggesting that union funds were misappropriated by local officials. A series of letters were exchanged between the attorney for the plaintiffs and a representative of

USW. On March 6, 1980, the representative of USW wrote the plaintiffs' attorney stating that USW had determined to turn the matter over to the United States Department of Labor for investigation of the charges against the Local officers.

USW contends that its action in turning this matter over to the Department of Labor was reasonable and in no way manifests a decision on its part not to pursue the alleged wrongdoers. Although USW's election may be logical and in the best interest of the union, it does not obviate the fact that the union has refused to bring suit after a demand of several months standing. This Court, therefore, finds that the second condition precedent to suit has been met.

The third condition precedent to bringing suit is that the plaintiff be a "member" of the union. The complaint alleges that plaintiffs "were at all times material hereto members in good standing" of Local 7326 of USW. Without question, plaintiffs were members of the union for purposes of § 501(b) during the time of the alleged misappropriation of funds. The USW points out, however, that plaintiffs are not now, and were not at the time suit was filed, members of the union.

Local 7236 went on strike against the only employer employing any of its members in December, 1976. The strike was long and bitter, ending in failure in May, 1978. Thereafter, USW lost the right to represent the company's employees following its defeat in a National Labor Relations Board decertification election conducted in May, 1978. The Board overruled USW objections to the decertification election on July 14, 1978.

Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit.

No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

During the strike, USW placed money in a special strike fund for the use of Local 7326 to cover expenses of the strike and to aid members through the economic hardship of the strike. The Local was responsible for the distribution of these funds, and it is with respect to these funds that plaintiffs charge misappropriation by officers of Local 7326. Pursuant to agreement between USW and its locals, any funds remaining in local strike funds after conclusion of strikes are returned to USW.

All dues paid by members of the USW are the property of USW rather than the local, and in the event of the revocation of a local union's charter or if a local union disbands, all assets of the local are returned to USW. Article IX, Sec. 4, of USW Constitution.

Finally, Article XI, Section 7 of the USW Constitution, provides:

> A member whose membership is terminated shall have no right or interest in any property of the Local Union or of the International Union, including any dues, assessments or other financial obligations paid by such member in advance of the effective date of such termination.

Plaintiffs concede that since they are no longer union members they have no derivative interest in any recovery effected by them on behalf of the union. They insist, however, that they have an interest in righting a wrong which the local union officers inflicted on them and other members of Local 7326. Plaintiffs argue that USW has no interest in stopping wrongdoing of local union officers and that its actions from the time of plaintiffs' original demand for an investigation to the present has been protective of the local officers. Plaintiffs argue that un-

less they are allowed to prosecute this action, any effort by USW will be feeble at best and will strangle in bureaucratic inertia and dilatory "buck-passing." Hopefully, USW will recognize its interest in pursuing wrongdoing where it occurs on the part of Local officers. The interest of USW in taking strong action to halt the misappropriation of funds provided by it to strikebound Locals would seem obvious.

This Court, however, recognizes the possibility that USW may be less than vigorous in pursuing this matter. However, the issue remains as to whether plaintiffs meet the third condition precedent to suit under 29 U.S.C. § 501(b); i.e., that they be Union members. This Court on re-consideration holds that they do not, and therefore, withdraws its leave to file this action granted herein on May 1, 1980.

Plaintiffs rely on *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968) in support of the proposition that they meet the requirement of union membership imposed by the statute. In *Phillips*, *supra*, the erstwhile plaintiff was a union member at the time he brought suit according to the Constitution and By-Laws of the Union. The court nevertheless held that he could not bring the suit because he had also joined a rival labor organization and his interest at the time he filed suit was actually antagonistic to the union for which he sought to bring the action, and for purposes of § 501(b), he was not an appropriate person to bring an action for the benefit of the Union.

Plaintiffs' attorney points out that no such antagonistic interest prevails with the instant plaintiffs. They are not members of a rival union. But unlike the plaintiff who was disqualified in *Phillips*, the instant plaintiffs were not members of USW when suit was filed.

In *Phillips*, *supra*, the court pointed out that § 501(b) gives the union members a right akin to the right of shareholders in a shareholder derivative suit. The Court stated:

> The condition of membership, which is expressly required by the Section, seeks to insure that a representative of the union, the real party in interest, will properly represent the union's interests in the litigation. *Phillips*, *supra*, at 832.

The plaintiffs in the instant suit, therefore, may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. 7A C. Wright & A. Miller, *Federal Practice and Procedure*, 325 (1972); 19 Am.Jur. 2d, *Corporations*, § 559. A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise.

In *Schilling v. Belcher*, 582 F.2d 995, (5th Cir. 1978), the court considered the standing of a former stockholder to bring an action on behalf of the corporation. At page 999, the *Schilling* court stated:

> Fed.R.Civ.P. 23.1 contains two discrete standing requirements: (1) the plaintiff must have owned stock in the defendant corporation at the time of the transaction of which he complains, the so-called "contemporaneous ownership" requirement, and (2) the plaintiff must be a shareholder of the defendant corporation at the time suit is brought. The latter requirement, unlike the contemporaneous ownership rule, is not expressly stated in the rule, but rather is implied by the statement that an action under Rule 23.1 may be "brought by one or more share-

holders . . . to enforce a right of a corporation." Only a shareholder, by virtue of his "proprietary interest in the corporate enterprise," *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may "step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). Thus, it is generally held that the ownership requirement continues throughout the life of the suit and that the action will abate if the plaintiff ceases to be a shareholder before the litigation ends. C. Wright & A. Miller, 7A Federal Practice and Procedure § 1826, at 325 (1972); see *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976); *Niess v. Gorsuch*, 295 F.2d 909 (9th Cir. 1961); 3B Moore's Federal Practice ¶ 23.1.17, at 23.1-63 (2d ed. 1978); see also Annot., 168 A.L.R. 906 (1947).

The *Schilling* court also quoted from *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735-736 (3rd Cir. 1970) as follows:

> Standing [to bring a derivative action in behalf of a corporation] is justified only by [the] proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest.

Plaintiffs also rely on *Axelrod v. Stoltz*, 264 F.Supp. 536 (E.D.Pa. 1967). In *Axelrod*, *supra*, the party seeking to bring the suit was suspended from union membership, and the union contended that it had to take formal action to reinstate the party before he was a "member" within the meaning of § 501(b). The court in *Axelrod* held that Axelrod became a "member" of the union when his period of suspension expired even though

the union had not taken any affirmative action to reinstate.

As the *Axelrod* court stated:

> When Axelrod's period of suspension ended, there was no requirement for any proceedings looking to reinstatement. When he tendered dues after the expiration of the suspension period, he had done all that was necessary to the restoration of his benefits and privileges as a union member. The rejection of the tender of dues was improper. *Axelrod v. Stoltz, supra*, at 540.

Thus, the *Axelrod* court recognized the requirement of § 501(b) that in order to maintain the action the plaintiff had to be a member of the union, and it expressly found such membership existed.

Plaintiffs argue that their lack of union membership is through no fault of theirs, but results from the fact that their local union ceased to function. This is obviously true, but this does not give them the standing of "membership" which is required to bring this action. To paraphrase the language of *Schilling, supra*, at p. 1002, "a close reading" of § 501(b) persuades us that Congress "has not chosen to entrust the heavy responsibility of vindicating unenforced" union "rights to a representative who is no longer a member of the class which will benefit or suffer from his actions." Accordingly, it is

ORDERED that leave to file the complaint herein granted on May 1, 1980, be, and is hereby, WITHDRAWN.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

Civil Action No. 80-180-N

ELBERT ERKINS, and SAMUEL DENSON, and PERRY CULPEPPER

Plaintiffs

vs.

BILLY BRYAN, and ARTHUR COMER, and GEORGE BULLARD, and CHARLIE GREENE

Defendants

[Filed July 21, 1980]

ORDER

This cause is before the Court on plaintiffs' motion for reconsideration filed herein on July 14, 1980. In their motion plaintiffs now state that they do not concede that they were not members of Local 7326 when the complaint was filed. Plaintiffs argue that because the closing audit has not occurred under administratorship, the local union has not been dissolved. Based on this fact, plaintiffs now make the assertion that they are still members of the union for the purpose of construing 29 U.S.C. § 501(b).

The argument presented to this Court orally by plaintiffs' counsel on June 20, 1980, and the documents on file in this cause simply do not support plaintiffs' present assertion of present membership in the local union.

From the argument reported stenographically and transcribed in part at the Court's request, plaintiffs' counsel again and again acknowledged that plaintiffs

were not members of the union at the time the complaint was filed. Counsel contended that Title 29, § 501(b) was met if plaintiffs were loyal union members at the time the union was decertified. For example:

> MR. JACOBSON: If Your Honor please, as I recall, when we met in the Court's chambers, I recall distinctly indicating to the Court, and the complaint so indicates, that Mr. Erkins and Mr. Denson and Mr. Culpepper were members of the union at the relevant—what we allege is the relevant period of time, which was up to the time the union was decertified, and that we did indicate to the Court that the union local was no longer in existence, because the strike had been lost and that the local had been decertified, and I do apologize to the Court if I gave the Court the impression they were members at the time of the complaint.

And later:

> MR. JACOBSON: Now, on the issue of membership, which bothers the Court, because clearly they were not members at the time. . .

And later:

> MR. JACOBSON: A common sense reading of what membership has got to mean in this situation, it's got to mean that as far as the strike which ends up in decertification. It is the members in good standing during the strike up to the point of decertification, and none of these plaintiffs, Your Honor, crossed that picket line.

Thus, plaintiffs' counsel conceded that plaintiffs were not union members when suit was filed and argued forcefully that this fact was irrelevant in light of the plaintiffs' undisputed membership when the alleged improprieties occurred.

As stated in this Court's order entered herein on June 30, 1980, vacating leave to file suit granted on May 1, 1980:

> Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit. No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

The union is in a caretaker status until it is accounted for and dissolved, but the fact that this process has not concluded is insufficient to support plaintiff's newly-found assertion of present union membership nor does that fact have any effect on this Court's determination that plaintiffs lack standing to sue under 29 U.S.C. § 501(b).

Plaintiffs' counsel argued vigorously at the hearing that these plaintiffs were not to blame because they were no longer union members. Plaintiffs' counsel insisted that plaintiffs had been loyal members throughout the strike and were loyal members when the alleged wrongs took place. These facts are not in dispute, but they do not give "standing."

The basis for the Court's withdrawal of its right to file the complaint was based upon the plaintiffs' lack of any derivative interest in the outcome of the lawsuit. Any derivative interest these plaintiffs might have had in the outcome of this lawsuit was extinguished on the decertification of the union and the absence of any activity by the union or by these plaintiffs as union members for eighteen months prior to the filing of this suit. The outcome of plaintiffs' claim in this suit would in no way benefit plaintiffs, whether the process of

liquidating the union has been concluded or not. The mere fact that this defunct union has not been liquidated cannot give these plaintiffs a derivative interest in the outcome of the lawsuit. In the opinion of this Court, these plaintiffs are not proper representatives to bring a suit for the benefit of the union. Membership in the union is a clear requirement by Congress when it bestowed the right of action in 29 U.S.C. § 501(b).

Accordingly, it is ORDERED that plaintiff's motion for reconsideration be, and it is hereby, denied.

DONE this 21st day of July, 1980.

/s/ Truman Hobbs
United States District Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-1051

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

ROBERT ERKINS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1982.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of June, 1982.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-1051

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

ROBERT ERKINS, ET AL.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including August 16, 1982.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 9th day of July, 1982.